(2)

Supreme Court U.S.
FILED
AUG 2 2002
OFFICE OF THE CLERK

No. 02-35

# In The Supreme Court of the United States

JESSE UPSHER; ANNIE ABRAHAM; EDWARD BRODZIK; JEANETTE BRODZIK; HENRY HUCZEK; AURELIA HUCZEK; STEPHEN KALMUS; CATHERINE KALMUS; KAREN KOHL; TRACY THACKER; JOHN O'LOUGHLIN,

*Petitioners,*

v.

GROSSE POINTE PUBLIC SCHOOL SYSTEM; GROSSE POINTE BOARD OF EDUCATION; SUZANNE KLEIN; CHRISTINA FENTON; TIMOTHY HOWLETT; PAUL PAGEL; CARL ANDERSON; JACK RYAN; JOHN MILLS; CYNTHIA PANGBORN; SEARS TAYLOR; MARY BETH HERMAN; JAY JEFFRIES; STEVE MATTHEWS; ED SHINE; LARRY YANKAUSKAS, individually and in their respective capacities,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION

TIMOTHY D. WITTLINGER
*Counsel of Record*
EVELYN L. SULLEN
CLARK HILL PLC
500 Woodward Avenue,
Suite 3500
Detroit, MI 48226-3435
(313) 965-8300

*Attorneys for Respondents*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

1789

## STATEMENT PURSUANT TO RULE 29.6

Petitioners are individual residents of the State of Michigan. Petitioner Steven Kalmus is deceased, having died of causes unrelated to this litigation during the pendency of this appeal. The record below, including the complaint filed in the District Court, refers to the first named Petitioner as "Jesse Upshur." However, the Court of Appeals published opinion and this Petition refer to that individual as "Jesse Upsher."

Individual Respondents are residents of the State of Michigan. The Grosse Pointe Public School System is a general powers public school district organized under the laws of the State of Michigan, and is engaged in the operation of public schools in a geographic area in south-eastern Michigan. It has neither parent nor subsidiary corporations and its board members are elected by the public. The Grosse Pointe Board of Education is not a corporate entity and the reference thereto presumably refers to the board members of the Grosse Pointe Public School System or to the Grosse Pointe Public School System itself.

TABLE OF CONTENTS


| | Page |
|---|---|
| STATEMENT PURSUANT TO RULE 29.6 | i |
| TABLE OF CONTENTS | ii |
| TABLE OF AUTHORITIES | iii |
| COUNTER-STATEMENT OF THE CASE | 1 |
| REASONS FOR DENYING THE WRIT | 5 |
| I. THE COURT OF APPEALS' OPINION DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR DECISIONS OF OTHER CIRCUITS | 5 |
| II. THE COURT OF APPEALS' OPINION DOES NOT CONFLICT WITH DECISIONS OF THE MICHIGAN SUPREME COURT | 7 |
| III. THE COURT OF APPEALS' OPINION IS IN ACCORDANCE WITH THE LAW ESTABLISHED BY THIS COURT AND BY THE SIXTH CIRCUIT, AND IS NOT "PLAIN ERROR" | 10 |
| CONCLUSION | 12 |

# TABLE OF AUTHORITIES

Page

CASES

*Bazinau v. Mackinac Carriage Tours*, 233 Mich. App. 743, 593 N.W. 2d 219 (1999) ..... 8

*Beauchamp v. Dow Chemical Company*, 427 Mich. 1, 398 N.W. 2d 882 (1986) ..... 7

*Collins v. City of Harker Heights, Texas*, 503 U.S. 115, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992) ....6, 10, 11

*Daniels v. Williams*, 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986) ..... 11

*Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993) ..... 1

*DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989) ..... 11

*Gazette v. City of Pontiac*, 41 F. 3d 1061 (6th Cir. 1994) ..... 6, 10

*Golec v. Metal Exchange Corporation*, 453 Mich. 149, 551 N.W. 2d 132 (1996) ..... 7, 8

*LaBounty v. Coughlin*, 137 F. 3d 68 (2nd Cir. 1998) ..... 5, 6

*Lewellen v. Metropolitan Government of Nashville and Davidson County, Tennessee*, 34 F. 3d 345 (6th Cir. 1994) ..... 5, 6, 10, 11

*Palazzola v. Karmazin Products*, 223 Mich. App. 141, 565 N.W. 2d 868 (1997) ..... 9

*Travis v. Dreis & Krump Manufacturing Company*, 453 Mich. 149, 551 N.W. 2d 132 (1996) ..... 7, 8

*Upsher, et al. v. Grosse Pointe Public School System, et al.*, 285 F. 3d 448 (6th Cir. 2002) ..... 6, 7, 10

TABLE OF AUTHORITIES – Continued

Page

STATUTES

42 U.S.C. 1983 .....5, 8, 10

M.C.L.A. 418.131(1) ..... 7

## COUNTER-STATEMENT OF THE CASE

Petitioners' statement of the case contains factual allegations not supported by the record before the lower Court and in many instances contrary to such record. Significant examples of these discrepancies are set forth below, and are not meant to be exhaustive.

1. Petitioners rely on deposition testimony of two experts[1] to the effect that Petitioners suffered injury as a result of actions of Respondents, stating that such testimony is unrebutted.

a. In spite of the fact that the medical literature is replete with epidemiologic studies relating to asbestos exposure, Mr. Wabeke testified that he did not review any such studies in connection with his work on this case (Court of Appeals Joint Appendix (C. A. App.) at 675). Mr. Wabeke correctly testified (C. A. App. at 679) that the maximum acceptable time weighted average concentration for occupational exposure to asbestos was one-tenth of a fiber per cubic centimeter of air over an eight-hour period. However, he was unable to provide any testimony as to the amount of asbestos fibers released at Grosse Pointe South High School during the incident in question. He testified as follows (C. A. App. at 681):

---

[1] Respondents argued in the Court of Appeals that Petitioners' two proffered experts, by their own admissions, were not qualified to give opinions as their testimony did not meet the requirements of *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

Q You would have to speculate in order to – to set a figure as to the amount of asbestos fibers released at the Grosse Pointe Schools in 1995; isn't that correct?

A I – yeah, I suppose. One is too many if it's controllable.

Mr. Wabeke further admits that he does not have experience with regard to asbestos remediation involving vinyl asbestos tile (C. A. App. at 683). Mr. Wabeke candidly admits that in order to extrapolate from other fact situations and reach a conclusion about asbestos release in the case at bar would be a "quantum leap" and "speculation." (C. A. App. at 684). Concerning total exposure (as opposed to time weighted average concentration)[2] Mr. Wabeke testifies (C. A. App. at 690) that the maximum total exposure which plaintiffs could have encountered was 14/10,000 of a fiber year. This is a negligible amount compared with the 10 and 20 fiber year exposure of employees that normally occurs in the insulation trade, pipe fitting trade, or other occupations where epidemiologic studies have been undertaken.

b. Dr. Chiodo's opinion was based on epidemiologic studies unrelated to the situation in the case at bar. Dr. Chiodo relied on studies involving asbestos exposure of construction ironworkers and

[2] Time weighted average concentration is the measure of the amount of asbestos fibers in the air at any given time. Total exposure is the amount of asbestos to which a person is exposed during a given period of time.

> Swedish insulation workers, which he readily admitted were not applicable to the case at bar (C. A. App. at 508). Significantly, Dr. Chiodo testified that he had no knowledge and was unable to provide any evidence as to the level of asbestos exposure, if any, encountered by Petitioners. Dr. Chiodo testified (C. A. App. at 504-06) that he did not know the time weighted average concentration to which any of the Petitioners were exposed, nor the total exposure in fiber years of any of the Petitioners.

2. Petitioners state that the carpet removal project lasted ten days. The record reflects that the project lasted no more than four days (C. A. App. at 466, 576, 599-607).

3. Petitioners state that New York Carpet World walked off the project when it discovered that the tiles contained twenty-five percent asbestos. The record establishes that New York Carpet World advised Respondent Pagel that the method they used for removing old carpet was to use a mechanical scraper, and if there were asbestos tiles under the carpeting, that process might disturb the tiles (C. A. App. at 650). This is the reason that the decision was made to remove the carpet by hand, so that the tiles under the carpet would not be disturbed.[3]

---

[3] It is unrebutted that no one anticipated that in connection with removal of the carpet, the underlying tiles would be disturbed or would come loose. Petitioners were instructed to remove carpet, not tiles (C. A. App. at 660).

4. Petitioners state that Respondents were aware that tiles would become detached from the floor and would release asbestos fibers. The record reflects that Respondents' only knowledge was that the tiles could contain asbestos. Such knowledge is not equivalent to knowledge that tiles would become detached from the floor or would release asbestos fibers. Only Respondent Jeffries, who was working on the carpet project as the "foreman" was aware that tiles were coming detached from the floor. The record is clear that he was unaware of any danger as a result of such condition and continued working. None of the other Respondents were aware that tiles were becoming detached from the floor until after the project was completed.

5. Petitioners refer to violations received by the Grosse Pointe Public School System in connection with this project. The only two violations received were for failure to conduct air monitoring during the project and failure to instruct employees as to asbestos-related facts. Respondents received no violations in connection with the actual physical removal of the carpet. Provided air monitoring was conducted and proper asbestos instruction was given, the carpet removal project ordered by Respondents and conducted by Petitioners would not have been a violation of any law and would have been permitted to proceed.[4] The particular regulations for which Respondents were cited did not themselves cause any injury to Petitioners.

---

[4] Carrying Petitioners' argument to its logical extension leads to the conclusion that under the facts of this case, and assuming air monitoring and proper instruction, Petitioners would have no claim even though their exposure would have been the same.

## REASONS FOR DENYING THE WRIT

Petitioners argue that the writ should be granted for three reasons (Petition at 18-19):

1. The decision of the United States Court of Appeals for the Sixth Circuit conflicts with holdings of this Court and other circuits.

2. The decision of the United States Court of Appeals for the Sixth Circuit conflicts with decisions of the Michigan Supreme Court on Petitioners' state law claims.

3. The United States Court of Appeals for the Sixth Circuit committed plain error.

### I. THE COURT OF APPEALS' OPINION DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR DECISIONS OF OTHER CIRCUITS

The only Court of Appeals' opinion cited by Petitioners to support their argument that there is a conflict among the circuits relating to the proper test to be applied in determining a violation of 42 U.S.C. 1983 is *LaBounty v. Coughlin*, 137 F. 3d 68 (2nd Cir. 1998). The Sixth Circuit opinion in this case clarified that different principles would apply in a custodial case, such as *LaBounty, supra.* Eighth Amendment considerations alone may very well dictate a different test being applied in a custodial setting. The Sixth Circuit cites and relies on *Lewellen v Metropolitan Government of Nashville and Davidson County, Tennessee*, 34 F. 3d 345 (6th Cir. 1994) in its holding below that in a non-custodial setting, "plaintiff must prove that the governmental actor either intentionally injured the

plaintiff or acted arbitrarily in the constitutional sense." *Upsher, et al. v. Grosse Pointe Public School System, et al.*, 285 F. 3d 448, 453 (6th Cir. 2002), citing *Lewellen, supra,* at 350-51 and *Gazette v. City of Pontiac,* 41 F. 3d 1061, 1067 (6th Cir. 1994). *LaBounty, supra*, is not in conflict with these decisions, as courts have recognized a key distinction between custodial and non-custodial cases. The Sixth Circuit opinion in this case is entirely consistent with previous appellate decisions, including *LaBounty, supra*, and complies with this Court's pronouncement in *Collins v. City of Harker Heights, Texas*, 503 U.S. 115, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992).

Having determined that the law requires evidence of conduct "intentionally designed to punish someone" or "conscious shocking" behavior, the Sixth Circuit examines the record and finds no such evidence. An examination of the record below establishes that this conclusion is correct. None of the Respondents (with the exception of Respondent Jeffries) were aware that carpet tiles were becoming detached from the floor. In addition, none of the Respondents (including Respondent Jeffries) were aware of any danger to which Petitioners were exposed. As the Sixth Circuit correctly stated,

> "We cannot find, nor was our attention invited to, any evidence in the record which suggests that any of the defendants made a deliberate decision to inflict pain or bodily injury on any of the plaintiffs. Neither is there proof that the defendants engaged in arbitrary conduct intentionally designed to punish the plaintiffs – conduct which we have recognized may result in the deprivation of a constitutionally-protected interest. *Id.* Without more, we conclude that the plaintiffs' evidence establishes, at best, a case sounding in

> negligence and not a constitutional tort under Section 1983." (*Upsher, supra*, at 453-54).

Inasmuch as Petitioners have not cited any Court of Appeals' authority in conflict with the Sixth Circuit opinion in this case, the writ should be not be granted.

## II. THE COURT OF APPEALS' OPINION DOES NOT CONFLICT WITH DECISIONS OF THE MICHIGAN SUPREME COURT

Petitioners' state law claim rests upon the intentional tort exception to the Michigan Worker's Disability Compensation Act (MWDCA), M.C.L.A. 418.131(1). The law relating to the intentional tort exception has been evolving in Michigan since the 1986 decision of the Michigan Supreme Court in *Beauchamp v. Dow Chemical Company*, 427 Mich. 1, 398 N.W. 2d 882 (1986). The law has now been set to rest by the Michigan Supreme Court's dual decisions in *Travis v. Dreis & Krump Manufacturing Company*, and *Golec v. Metal Exchange Corporation*, 453 Mich. 149, 551 N.W. 2d 132 (1996). To establish an "intentional tort" Michigan law requires either:

1. An injury to an employee as a result of a deliberate act of the employer where the employer specifically intended an injury, or

2. An injury to an employee where the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge.

Michigan law also provides that the question of whether or not the facts in a case constitute an intentional tort is a question of law for the court.

The Sixth Circuit, in its analysis of Petitioners' Section 1983 claim, found that the record did not reflect an intentional act as required by 42 U.S.C. 1983. The Court then applied the same rationale to hold that there was no intentional tort. The lack of knowledge of Respondents as to the progress of the carpet project and the failure of Respondents to adequately comprehend any danger (if any such danger existed), requires the conclusion that no intentional tort has been proven, nor can such an intentional tort be established from the state of the record below.

In *Golec, supra*, the employer had knowledge that the condition in the plant which caused injury to the plaintiff had in fact caused a similar injury in the past. In spite of this knowledge and in spite of the history of the respective condition to cause injury, the employee was ordered to continue working. Here, Petitioners were not ordered to remove tile, just carpet, and there was no indication that the tile would become detached with the carpet.

Other Michigan cases decided since *Travis* and *Golec, supra*, hold the same. *Bazinau v. Mackinac Carriage Tours*, 233 Mich. App. 743, 593 N.W. 2d 219 (1999), involved an employee traveling across the ice between Mackinac Island and the mainland in connection with delivering horse feed to Mackinac Island. Plaintiff argued that the intentional tort exception should apply when the vehicle broke through the ice. The Michigan Court of Appeals indicated that evidence of increased risk of injury or increased probability of injury is not admissible, as the injury must be certain to occur. The court held that the intentional tort exception did not apply.

*Palazzola v. Karmazin Products, 223* Mich. App. 141, 565 N.W. 2d 868 (1997), involved injuries to an employee cleaning sludge from a tank and being overcome with trichloroethyline fumes. The employee's supervisor was not aware of, nor did he appreciate, the risk. The Michigan Court of Appeals stated that in order to establish an intent to injure, the evidence must show a deliberate act or omission specifically intended to cause an injury by a particular employee. Disconnected testimony by various employees is not sufficient. In *Palazzola, supra*, a case with strikingly similar facts to the case as bar, the supervisor instructed the employees to drain and fill the tank, not to clean the sludge from the tank. In the case at bar, Petitioners were instructed to remove the carpet, not the tile. Also, the foreman in *Palazzola, supra*, was not aware of the danger of the trichloroethyline fumes, and actually was in the tank himself doing work. In the case at bar, Respondent Jeffries, the foreman on the job, was also removing carpet and did not appreciate any danger involved. Holding that the facts did not establish an intentional tort exception to the MWDCA, the Michigan Court of Appeals affirmed the trial Court's dismissal of plaintiff's claim.

Further substantiating the lack of liability of Respondents is the fact that at most, Petitioners were exposed to 14/10,000 of a fiber year, an extremely negligible amount. Also, none of the Petitioners suffer from any medical consequences of asbestos exposure.

The Sixth Circuit opinion below is in accord with applicable Michigan authority, and consequently the writ should not be granted.

## III. THE COURT OF APPEALS' OPINION IS IN ACCORDANCE WITH THE LAW ESTABLISHED BY THIS COURT AND BY THE SIXTH CIRCUIT, AND IS NOT "PLAIN ERROR"

Petitioners state that the Sixth Circuit opinion affirming the trial court's dismissal of their 42 U.S.C. 1983 claim was "plain error." However, the Sixth Circuit relies on its previous opinion in *Lewellen, supra,* a case which itself relies on *Collins v. City of Harker Heights, Texas, supra.* Petitioners cite no authority in support of their proposition that the Sixth Circuit committed "plain error" and the Petition does not even address the opinion in *Lewellen, supra.* The Sixth Circuit analysis of *Lewellen, supra,* and its reference to *Collins, supra,* and *Gazette, supra, (Upsher, supra,* at 452-53, provide the best argument as to why the Sixth Circuit opinion is in accord with prior law and not "plain error."

The law establishes that gross negligence is not the type of governmental action needed to support a 42 U.S.C. 1983 claim. Gross negligence is not actionable under 42 U.S.C. 1983 because it is not "arbitrary in the constitutional sense." *Gazette, supra,* at 1067, *Lewellen, supra,* at 350-351. Reckless or grossly negligent conduct (assuming that Petitioners could establish such conduct) is not enough to support a 42 U.S.C. 1983 claim. In *Lewellen, supra,* plaintiff was a construction worker severely injured when his construction materials came into contact with a power line. Plaintiff argued that defendants City and School District should be liable under 42 U.S.C. 1983 because they chose to build a school directly beneath a high voltage line, delayed removal of the line, violated applicable safety and electrical code standards, and willfully

disregarded the high risk of injury. The Sixth Circuit disagreed with the plaintiff's argument in *Lewellen*, *supra*, stating (34 F. 3d at 348):

> . . . [T]he defendants obviously did not make a *deliberate decision to inflict pain* or bodily injury on the plaintiff. The defendants may have been negligent, but it is now firmly settled that *injury caused by negligence does not constitute a 'deprivation' of any constitutionally protected interest.* [Emphasis added]

citing *Collins, supra*; *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989); and *Daniels v. Williams*, 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986).

In the instant case Petitioners describe, at best, negligent conduct. Viewing Petitioners' best attempt to paint a grim picture of Respondents' actions in the most favorable light, this Court cannot conclude that Respondents made a deliberate decision to inflict pain upon Petitioners. Petitioners have failed to establish "plain error" and as such the writ should not be granted.

## CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

TIMOTHY D. WITTLINGER
*Counsel of Record*
EVELYN L. SULLEN
CLARK HILL PLC
500 Woodward Avenue,
Suite 3500
Detroit, MI 48226-3435
(313) 965-8300

*Attorneys for Respondents*

Dated: August 2, 2002